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SERVICE DEMANDS ON THE LOCAL AUTHORITIES IN MALAYSIA: BALANCING OBLIGATIONS AND BUDGET CONSTRAINTS*

Nik Ahmad Kamal Nik Mahmod**

ABSTRACT

Within the federalist framework that consists of the Federal government and the states, there exists a third level of administration, the local government, which administers the towns and cities as provided by federal law and serves the people in municipalities, providing services and amenities for conducive living. Employing doctrinal methodology using a descriptive and critical analytical approach, the paper delves into the complex situation of the local authority (LA). On the one hand, it is expected to carry out its functions effectively. Nevertheless, it needs to be improved by overcoming financial constraints that limit its ability to undertake projects that benefit the people. The paper will specifically examine two aspects of LA's power: the statutory mandatory and non-mandatory powers. These powers have profound implications on LA's functions and duties, particularly from the perspectives of LA's financial capabilities in fulfilling these mandatory and discretionary responsibilities. Statutory duties open LA to judicial control, while LA's political and moral obligations to provide services open LA to public criticism. Indeed, it is a tricky balance, and the existing statutory and political framework may not provide a conducive environment for LA to prosper.

Keywords: Local Authorities, Local Government Act, Financial Constraints, Judicial Review, Accountability.

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** Professor, Faculty of Law, Multimedia University, Jalan Ayer Keroh Lama, 75450 Bukit Beruang, Melaka, Malaysia.
Email: nik.ahmadkamal@mmu.edu.my / nnikmahmod@gmail.com (Corresponding Author).

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PERMINTAAN PERKHIDMATAN DARIPADA PIHAK BERKUASA TEMPATAN: MENGIMBANGI PERLAKSANAAN TANGGUNG JAWAB DAN KEKANGAN BAJET

ABSTRAK

Dalam kerangka federalisme yang merangkumi kerajaan Persekutuan dan kerajaan negeri, wujud satu lagi tahap pentadbiran ketiga iaitu kerajaan tempatan, yang mentadbir bandar dan kawasan perbandaran seperti yang diperuntukkan oleh undang-undang persekutuan dan berperanan memberikan perkhidmatan serta kemudahan kepada masyarakat untuk kehidupan yang lebih selesa. Menggunakan metodologi doktrinal dengan pendekatan deskriptif dan analisis kritikal, artikel ini meneliti situasi kompleks pihak berkuasa tempatan (PBT). Di satu pihak, PBT diharapkan melaksanakan fungsinya dengan berkesan. Namun begitu, pencapaian ini memerlukan penambahbaikan dengan mengatasi kekangan kewangan yang menghadkan keupayaannya untuk melaksanakan projek yang memberi manfaat kepada rakyat. Artikel ini akan memberi tumpuan khusus kepada dua aspek kuasa PBT: kuasa mandatori dan tidak mandatori yang diperuntukkan secara statutori. Kuasa-kuasa ini mempunyai implikasi besar terhadap fungsi dan tanggungjawab PBT, terutamanya dari sudut keupayaan kewangan PBT dalam melaksanakan tanggungjawab wajib dan budi bicara tersebut. Tanggungjawab statutori mendedahkan PBT kepada kawalan kehakiman, manakala tanggungjawab politik dan moral PBT untuk menyediakan perkhidmatan pula membuka ruang kepada kritikan awam. Sesungguhnya, ini merupakan suatu keseimbangan yang rumit, dan kerangka perundangan serta politik sedia ada mungkin tidak menyediakan persekitaran yang kondusif untuk PBT berkembang maju.

Kata Kunci: Kerajaan Tempatan, Akta Kerajaan Tempatan, Kekangan Kewangan, Semakan Kehakiman, Akauntabiliti.

INTRODUCTION

Federalism in Malaysia is centred on distributing legislative and executive powers between the federal and state governments, detailed by the Ninth Schedule of the Federal Constitution (FC) (article 76 FC). The third level of administration, the local government, administers the towns and cities as provided by federal law and serves the people in municipalities, providing services and amenities for conducive living. Local government matters are listed in the state list; thus, it gives the state the power and control over local government. Nonetheless, by article 95A of the FC, there shall be a National Council for Local Government (NCLG) to formulate in consultation with the Federal Government and State Governments a national policy for the promotion, development, and control of local government throughout the Federation and the administration of any laws relating to it (article 95A (3) FC). The Federal Government and State Governments shall follow the policy. Under this objective, various statutes were promulgated.

This paper delves into the complex situation of the local authority (LA). On the one hand, it is expected to carry out its functions effectively. Nevertheless, it needs to be improved by overcoming financial constraints that limit its ability to undertake projects that benefit the people. The paper will specifically examine two aspects of LA's power: the statutory mandatory and non-mandatory powers. These powers have profound implications on LA's functions and duties, particularly from the perspectives of LA's financial capabilities in fulfilling these mandatory and discretionary responsibilities. The paper will also consider the moral and statutory obligations that LA must meet and how its ability to carry out its functions effectively is contingent on its financial capacity, a critical issue that this paper aims to address.

RESEARCH METHODOLOGY

The paper dwells on the issues using doctrinal methodology and employs descriptive and critical analysis methods to discuss the main points. The research method focuses on the primary statute, the Local Government Act 1976. It also analyses court decisions on LA's general

and specific powers. The purpose of analysing the relevant statutory powers and the way the courts interpret these powers is to find the balance between the duty imposed by the statutes on LA to carry out its statutory duties and the reality that they must face in the event of a lack of funding to carry out those duties. The legal materials are evaluated first, using primary sources, namely statutes and case law, and then secondary sources to analyse the various methods used by LA to secure financial resources to undertake their statutory tasks.

The sources of legal materials used consist of primary legal materials, secondary legal materials, and non-legal materials. Legal materials are collected through literature study, internet browsing, and scientific article review. The presentation of legal materials is systematically arranged in the form of narrative text descriptions, tables, and charts. The method of analysis of legal materials used is qualitative normative analysis.

REGULATING LOCAL GOVERNMENTS

Statutes that regulate local governments include the Local Government Act 1976 (Act 171), Town and Country Planning Act 1976 (Act 172), etc. Act 171 imposes on LA responsibilities for cleanliness, general health conditions, amenities, and the general well-being of their residents, and they manage and control land planning and development within their local jurisdictions. Despite relying substantially on federal funding, local government authorities have exclusive jurisdiction over land planning and development in the states. The states are the central authority over their local governments, and local government policies and styles inevitably differ between them. Despite the promulgation of Act 171 and the establishment of the NCLG to promote uniformity in the administration of town and country planning law in the states, inconsistencies continue. In 2002, the National Physical Planning Council was established to ensure coordination in implementing rules and regulations to promote sustainable development and overcome regional economic imbalances.[1]

[1]Ainul Jaria Maidin and Bashiran Begum Ali, "Powers of the local authority in regulating land planning and development control: Wither control" *Journal of the Malaysian Institute of Planners* 7 no. 1 (2009), 133-147.

THE MANDATORY AND DISCRETIONARY POWERS OF LOCAL AUTHORITIES

LA has mandatory and discretionary powers provided by statutes. For instance, section 63 of Act 171 states that an LA shall have the general control and care of all places within the local authority area which have been or shall be at any time set apart and vested in the local authority for the use of the public or to which the public shall at any time have or have acquired a common right. However, section 64 states that LA may:

(a) make, construct, layout, or set apart new public places; and

(b) widen, open, enlarge, or otherwise improve any such public place-making due compensation per the provisions of any written law to the owners and occupiers of any land, houses, or buildings required for any such purpose or which are injuriously affected thereby.

While having control over public places and creating new places is mandatory, LA is not obliged to make or construct any new public places or erect new buildings in public places for general purposes. Regarding food, sanitation, and nuisance, LA has the power to carry out and maintain services and erect and maintain buildings for these purposes. However, LA is not required to fulfill those obligations. Section 72 empowers LA to act, but the provision does not require LA to carry it out. On the other hand, section 80 must take steps to remove, put down, and abate all nuisances of a public nature within the local authority area on public or private premises. It may proceed at law against any person committing any such disturbances for the abatement thereof and damages.

Nonetheless, refuse collection, street lighting, public health, and other services are expected out of LA for the ratepayers who pay taxes to LA to obtain those services. Interestingly, in section 94, LA may provide suitable places within or outside the local authority area for burial grounds or crematoria and shall make proper provisions for maintaining the same. The wording suggested that LA is not required to provide burial grounds and crematoria. However, once these facilities are built, LA will be obliged to maintain them. Thus, basic amenities such as parks, housing, and commercial activities are discretionary. However, as LA is established to serve its ratepayers and

provide the amenities and services to the people, LA has a moral obligation to carry out its functions in the best way possible.

Other roles that LA plays are also critical to the community, such as planning authority, licensing authority, taxation, undertaking to build houses, commercial constructions (market, hawker centres), urban planning and management functions, traffic management, and public utilities.

FINANCIAL RESOURCES AND REVENUE

According to section 39 of Act 171, LA's source of revenue is as follows:

(a) all taxes, rates, rents, license fees, dues, and other sums or charges payable to the local authority by the provisions of this Act or any other written law.

(b) all charges or profits arising from any trade, service, or undertaking carried on by the local authority under the powers vested in it.

(c) all interest on any money invested by the local authority and all income arising from or out of the property of the local authority, movable and immovable, and

(d) all other revenue accruing to the local authority is from the Government of the Federation or of any State or from any statutory body, other local authority, or any other sources such as grants, contributions, endowments, or otherwise.

Andrew Harding's study highlights the scarcity of accurate, up-to-date data on LA finances[2], He further elaborates that LA's sources of income are as follows:[3]

- local taxation in the form of property assessments or the equivalent (about 51%).
- rents and fees for services and licenses (about 32%); and

[2]Harding, Andrew, "A baseline study of local government in West Malaysia," *NUS Law Working Paper No 2022/14,* (2022) 1-41, 12.
[3]Harding, "A Baseline Study," 12.

- fiscal transfers from state and federal governments, for example, for road maintenance or specific development projects (about 17%).

Harding states that the Ministry of Housing and Local Government (MHLG) has classified local government's sources of revenue (i.e., those falling under (a) and (b) above) into six categories, namely:[4]

a) assessment rates.

b) fees for licenses and permits.

c) rentals.

d) government grants.

e) car parking charges, planning fees, compounds, fines, and interest.

f) loans (from higher levels of government/ financial institutions).

Under the Ninth Schedule of the FC, only Parliament can pass laws to levy central taxes such as income, export, and road taxes. Comparatively, the federal government obtains more revenue than the states. LAs rely on taxes and non-taxes revenue, and more often than not the operational costs exceed the revenue that they have obtained. The various sources include property taxes, business licenses, entertainment taxes, and other local fees.[5] In 2013, it was reported that the proportion of total government revenue collected by local governments was relatively small, at 3.4%.[6] Property assessment tax remains LA's primary revenue source. Since Act 171 sets a ceiling of 35% of the annual value or 5% of the value-added of a property, the amount of collectable revenue depends on the property's level of physical development.[7]

[4]Harding, "A Baseline Study," 12.

[5]Assessment rate is the main revenue of Las, which contributes more than half of the total local revenue. See Elina Mohd, Zainul Amin Ayub, Haslinda Mohd Anuar, "Administrative and enforcement issues in collecting arrears in local authorities in Malaysia" *International Journal of Innovation, Creativity and Change*, 13 no. 2 (2020), 947-957, 947.

[6]Harding, "A Baseline Study," 13.

[7]Harding, "A Baseline Study," 13.

PFI/PPP FOR LOCAL GOVERNMENT

The Local Government Act 1976 (LGA) empowers local authorities to implement local infrastructure, but the main challenge is often the lack of funding to carry it out.[8] One possible way is for local authorities to seek the partnership of the private sector to help finance the local authority's infrastructure projects.[9]

LA is prohibited from participating in business. However, LA can establish joint ventures with the private sector based on the public-private partnerships (PPP) principle or the Private Financing Initiative (PFI). PPP/PFI is a way of providing financial mechanisms for projects that are beyond LA's financial capability.[10] Maryadi Hasan and Dani Salleh found that PFI is a method of procurement in which the public sector uses the capacity of the private sector to deliver public infrastructure and services; however, it is still based on the specifications set by the public sector.[11] The authors referred to the UK specification of PPP/PFI as follows:

In the conceptual explanation, PFI can be explained as the public sector entering a long-term contract with the private sector companies, in which through a contractual agreement, the private sector is responsible for establishing, building, operating, maintaining, and risk involving the assets based on the output specification set by the government.[12]

The Ninth Malaysia Plan in 2006 introduced the PFI given the various successes in other countries and, first and foremost, to alleviate the financial burden the public sectors face in carrying out mandatory statutory developmental duties and the discretionary projects mandated by the statute. From the LA point of view, PFI has provided an impetus to provide infrastructures and services to the taxpayers within their jurisdiction. The main objective is to reduce the financial and

[8]Hassan Maryadi and Dani Salleh, "Identify Factors Influencing and Barriers to The Adoption of the Private Finance Initiative in Local Government in Malaysia" *International Journal of Law, Government and Communication*, 9 no. 3 (2018), 69-82, 70.
[9]Hassan and Salleh, "Identify Factors," 70.
[10]Hassan and Salleh, "Identify Factors," 70
[11]Hassan and Salleh, "Identify Factors," 70.
[12]Hassan and Salleh, "Identify Factors," 70

administrative burdens in providing public assets and services. The EPU Report 2006 stated that PFI aimed to improve efficiency and productivity, facilitate economic growth, reduce the size of the public sector, and help meet the national economic policy target. The key factors that make PFI important are:[13]

> …the reactive strategy is mainly due to pressure by the public to reverse earlier public-sector expansion and a monopolistic approach, especially in the provision of public assets and delivery of services (Rashid, 2012). Another reason to use PFI is to involve the private sector more efficiently and effectively in the realization of public infrastructure and creating long-term financial security

The Critical Success Factors (CSF) of PFI, according to various studies, include a well-established legal framework, stable political situation, strong economy and good local economic growth, strong capital market, an efficient and quick negotiation and procurement process, the presence of concrete and clear procurement framework that may expedite tendering process, complexities of PFI project financing requires experience and knowledgeable team members, clarity of funding system to ensure smooth servicing of debt, the ability for the LA to sustain the PFI because it is expensive and has a long period of payment, LA personnel must have good working knowledge of the PFI. Overall, LA must carry out the project.[14]

On the other hand, studies found that the most influential factor in PFI procurement is economic uncertainty, which mainly concerns LA's financial capability. LA may need to rely on the state government to provide funding. PFI procurement projects require a guarantor; in this respect, the state government must guarantee the projects. When the economy is not good, the state may have problems as a guarantor. They may seek help from the Federal Government, but if they are opposition-controlled, political issues crop up.[15]

The study by Muryadi and Dani indicated that the PFI model is less applicable in Malaysia due to various factors such as knowledge, understanding, and experience of the whole concept. The study confirmed previous studies, among others, that knowledge and

[13]Hassan and Salleh, “Identify Factors,” 71.
[14]Hassan and Salleh, “Identify Factors,” 73.
[15]Hassan and Salleh, “Identify Factors,” 73.

experience are the most influential factors.[16] The PFI executed in Malaysia is technically inconsistent with the fundamental PFI concept[17], Malaysia's PFI projects suffer from hasty, imprecise planning.

On the other hand, the weaker LA may find it challenging where the properties in its jurisdiction are lower in value, and the LA is often still strapped for financial resources. Thus, LA relies heavily on state and federal funding for its mandatory and discretionary activities. Regarding the federal grant, the possibility of political patronage plays a significant role.[18]

The following are the available federal grants for LA:[19]

(a) Annual equalisation grants channeled by the federation to the state for its LAs by the State Grant (Maintenance of Local Authorities) Act 1981.

(b) Launching grants for the LA restructuring exercise, which is based on several factors, such as the size of the LA, land area, population, and expected revenue.

(c) Development project grants for socio-economic projects such as infrastructure, social facilities, cleanliness and beautification, equipment and machinery purchases, recreational parks, and sanitary projects.

(d) Balancing grants are grants the state gives to cover rising operational expenditures or to utilise for minor development projects.

(e) License fees are the primary revenue source through levying fees for trading activities within the LA jurisdiction.

(f) Fees and service charges that LA may impose for activities and facilities for the local community, such as processing fees under the TPCA, car parking, etc.

(g) Federal funding is usually provided for needy areas, especially rural ones.

[16]Hassan and Salleh, "Identify Factors," 73.
[17]Hassan and Salleh, "Identify Factors," 76.
[18]Harding, "A Baseline Study," 12.
[19]Harding, "A Baseline Study," 12.

THE ROLE OF THE NATIONAL FINANCE COUNCIL (NFC)

By article 108(4), the federal government is required to consult the NFC on matters about the making of federal grants to the states; the assignment of the whole or any portion of the proceeds of the federal government to the states; the annual loan requirements of the federation and the states and the exercise by the federation and the states of their borrowing powers; and the making of loans to any of the states. Even though the NFC's role is purely consultative, the fact that the Prime Minister is the chairman, and the memberships include people from the states, the Council may assert strong influence on the decision to give loans to the states. NFC meets annually, but three states or more may request NFC to organise a meeting.

PRIVATISATION

The classic case of privatisation in LA is the privatisation of the cleansing services. Cleansing services such as garbage collection, cleanliness of drainage and waterways, and health and food safety are among LA's most critical activities and duties. R. Thillainathan and Kee-Cheok Cheong observe that the public-private partnerships are as follows:[20]

Then, the 1990s saw Malaysian privatisation efforts that were part of Vision 2020, in which the private sector was to be the driving force. To this end, the privatisation policies were given a fillip with the publication of the Privatisation Master Plan 1991. But it was in the 9th Malaysia Plan (2006–2010) that PFIs came into their own. In the Plan, strategies to streamline privatisation efforts, including approval procedures, emphasising performance standards, focusing on implementation and strengthening the institutional framework, and increasing Bumiputera participation were implemented. Under the Tenth Malaysia Plan (2011-2015), the PFI concept was given a

[20]Thillainathan R, Cheong, Kee-Cheok, "Malaysian Public-Private Partnerships – Incentivising private Sector Participation or facilitating rent-seeking" *Malaysian Journal of Economic Studies,* 56 no. 2 (2019), 177–200, 180.

makeover with greater clarity of rules that qualified its PFI projects as "new wave" PFIs.[21]

Harding referred to Singaravelloo, who said:[22]

> PFI have evolved over time in Malaysia, from the context of traditional privatisation involving both parties to the outsourcing of public services to the private partners through the awarding of contracts, to one that expects strong financial capacity from the private sector (during the Ninth Malaysia Plan), and on to one that shares the risks and burdens and better returns (in the Tenth Malaysia Plan).

The authors correctly identified three means of privatisation: the traditional privatisation initiative, outsourcing of public services, and awarding contracts to the private sector to carry out certain services. In September 2011, by the Urban Cleansing Management Act 2007, the federal government delivered urban cleansing services by a company appointed by the government in eight West Malaysian states and the federal territories. Opposition-controlled states did not accept the deal and continued to appoint their contractors. However, Harding succinctly and correctly concluded that privatisation was a problem in Malaysia. He said:[23]

Privatisation in the sphere of local government services has not succeeded in solving the problems with these services, while also spawning other problems. The story of urban cleansing does not show that there is a genuine alternative to providing a secure financial basis for local services. As a microcosm of decentralisation, local initiative and community commitment seem more likely to improve services than mega-fixes at the federal or even state level. Clean and consistent water supply and waste collection continue to be problems in many parts of the country.

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[21]Samer Shahedza Khairuddin and Khairuddin Abdul Rashid, "Quantity surveyors and their competencies in the provision of PFI services" *Malaysian Construction Research Journal,* 18 no. 1 (2016), 153-165.

[22]Harding, "A Baseline Study," 19. Singaravelloo, K, "Fostering public-private partnership in a win-win situation: The experience of a Malaysian local government" in Montanheiro L, and Spiering, M (eds), *Public and Private Sector Partnerships: The Enterprise Governance* (Sheffield Hallam University, 2013).

[23]Harding, "A Baseline Study," 20.

AUTONOMY

It is difficult to disagree that the states in Malaysia do not enjoy a measure of autonomy in the existing federal set-up.[24] The federation is so centralised that Malaysia is called a 'quasi-federation' rather than a genuine one. Sabah and Sarawak have a measure of autonomy, but not in Peninsular Malaysia.[25] In that light, local governments do not enjoy much autonomy.

Article 95A of the Constitution established the National Council for Local Government (NCLG) to promote, develop, and control local governments and, in turn, control the laws and policies that the states can make on local government.[26] The NCLG dictates state laws and policies on local governments to justify uniform laws and policies for LA in the country. The composition of NCLG, which includes the Prime Minister, Menteri Besar, Chief Ministers, and ten other representatives of the Federal Government, is very influential. The Prime Minister chairing the NCLG determines its agenda and direction, and ultimately, the NCLG agenda and interests reflect those of the federal government.[27]

Harding correctly argued that article 95A was introduced via an amendment to the constitution and could be unconstitutional based on the fundamental structure doctrine enunciated by various Federal Court judgments recently. NCLG, according to Harding, may be considered "quite improper in a federal system, as it can be said to trespass on states' rights, which include powers in respect to local government."[28] Even though Article 95A provides for formulating policies on the local government after consultation with the states, the federal government always has the upper hand.

[24]Harding, "A Baseline Study," 23.
[25]Harding, "A Baseline Study," 23.
[26]Harding, "A Baseline Study,"24.
[27]Harding, "A Baseline Study," 27.
[28]Harding, "A Baseline Study," 23.

LOCAL AUTHORITY'S SCOPE OF POWERS AND JUDICIAL REVIEW

The cardinal principle in the exercise of statutory power is that any act that exceeds the scope of the power is ultra vires, i.e., an action that goes beyond the powers given by statute. LA may also exceed its power if the act or decision is beyond what is reasonably incidental to the statutory powers that it enjoys.[29]

The question of standing or locus standing (the right to sue) to apply for judicial review is provided by Order 53 Rule 2(4), Rules of Court that, among other things, provide that the applicant must establish that he/she is 'adversely affected' by the decision of the LA. In the case of *Government of Malaysia v Lim Kit Siang,*[30] The Supreme Court, by majority, decided that Lim Kit Siang's private right was not affected by the remedy of injunction. Therefore, he had no locus standi to apply for an injunction. In 2012, Order 53 was amended to include the words 'adversely affected' person—the Federal Court in *MTUC & Ors. v Menteri Tenaga, Air dan Komunikasi & Anor*[31] decided that the 'adversely affected' person test includes an applicant who must at least must show he has a real genuine interest in the subject matter. The applicant does not need to show an infringement of private rights or the suffering of special damage.

In *The Guat Hong v. Perbadanan Tabung Pendidikan Tinggi Nasional*[32] it was stated that "a genuinely aggrieved person who has been adversely affected by a 'decision ' which fell into a 'grey' area, so to speak, that is, where amenability to judicial review was in doubt if at all, ought to be heard before she or he was shut out from the supervisory jurisdiction of the court. "

LA has broad discretionary powers to carry out planning and development control to ensure residents' comfort.[33] The role that the Local Government Act 1976 (Act 171) imposes on the LA covers

[29]Maidin and Ali. 2009. "Powers of the local authority in regulating land planning and development control: Wither control" *Journal of the Malaysian Institute of Planners*, 7 no.1 (2009), 133-147, 143.
[30][1988] 2 MLJ 12.
[31][2014] 3 MLJ 145.
[32][2018] 2 CLJ 762.
[33]Maidin and Ali, "Powers of Local Authority," 142.

health, sanitary conditions, amenities, and the general well-being of its residents. It also includes matters on land planning and development control. Act 171 was promulgated to promote uniformity in policy and laws for LA throughout the country. However, it is regulated by states with diverse political affiliations and administrative approaches, and such uniformity is difficult to achieve. In 2002, the National Physical Planning Council was established to introduce some kinds of coordination in implementing planning laws in the states to promote "development and overcome regional economic imbalances."[34]

Two other significant Acts that govern the LAs are the Town and Country Planning Act 1976 (Act 172) and the Street, Drainage and Building Act 1974. Quoting Mohamed Afandi, Maidin, and Ali correctly observed that the provision of the related local government laws empowers the local authorities to carry out a whole range of functions limited only by their ambitions and resources.[35] LA's significant functions include environmental, public, social, and developmental. As statutory bodies, LAs are subject to the law that established them and hold a legal status to sue and be sued. From public health to housing and commercial activities, LA carries out multifarious functions, including urban planning and management functions, traffic management and control, and public utilities. Where Act 172 does not apply, the State Director assumes the role of the local planning authority. The Federal Territory has its legislation, the Federal Territory (Planning) Act 1982 (Act 267). Sabah and Sarawak are regulated by other legislation and are not bound by Act 172.

Section 5 of Act 172 lays down the following functions of LA, namely:

(a) To regulate, control, and plan the development and use of all lands and buildings within its area.

(b) To undertake, assist in, and encourage the collection, maintenance, and publication of statistics, bulletins, monographs, and other publications relating to town and country planning and its methodology; and

(c) To perform other functions as the State Authority or the Committee may occasionally assign to it.

[34]Maidin and Ali, "Powers of Local Authority," 135.
[35]Maidin and Ali, "Powers of Local Authority," 136.

PLANNING PERMISSION

In the case of planning permission, the vast power of the LA includes any functions that are supplemental, incidental, or consequential to any of its unique functions. It also includes doing all such things as necessary or expedient in carrying out its planning functions under the Act. Act 172 requires a local plan to elaborate on the policies and proposals in the structure plan. A local plan comprises written statements and diagrams that outline the detailed planning and how to execute and implement the proposals in a local planning authority's structure plan.[36] The local planning authority must confirm that the proposed local plan generally conforms to the state's structure plan.

There have been instances where planning permission was refused even though the development applied for did not contravene the development plan. In *Chong & Co. Sdn. Bhd. v Majlis Perbandaran Pulau Pinang*.[37] It was decided that even if the development in respect of which permission was applied would not contravene any provision of the structure plan, planning permission could be validly refused on account of the provisions that the planning authority thinks are likely to be made in any development under preparation or to be prepared or the proposals relating to those proposals. In *Perbadanan Pengurusan Sunrise Garden Kondominium v Sunway City (Penang) Sdn Bhd & Ors and Another Appeal*,[38] the Federal Court reiterated the right to a reasoned decision as part of the right to be heard.

On another occasion, in the case of *Tetuan Sri Bangunan Sdn. Bhd. V Majlis Perbandaran Pulau Pinang*,[39] approval for the erection of a building does not amount to the approval of the development plan. It was held that the directions made by the local planning authority do not exclude the right of the planning authority to disprove the planning permission. In the case, the court held that directions made by the local planning authority under section 21(3) of Act 172 are not a decision made under section 22(3) of Act 172. LA may also use the power under these provisions to impose unreasonable and unjust conditions that may aggrieve the applicant with no right of appeal, for instance, under

[36]Maidin and Ali, "Powers of Local Authority," 137.
[37][2000] 5 MLJ 130.
[38][2023] MLJU 98.
[39][2007] 2 MLRA 187.

section 21(3) of Act 172.Where the development involves the erection of a building, the local planning authority may give written directions to the applicant in respect of any of the following matters:

(a) the level of the building's site.

(b) the line of frontage with neighboring buildings.

(c) the elevations of the building.

(d) the class, design, and appearance of the building.

(e) the class, design, and appearance of the building.

(f) the setting back of the building to a building line.

(g) access to the land on which the building is to be erected; and

(h) any other matter that the local planning authority considers necessary.

The only recourse is judicial review. Otherwise, the applicant must amend and submit the plan within a specified period. Failure to submit on time is deemed to be an application withdrawal. An appeal can only be made against a decision under section 22(3) of Act 172, where the local planning authority decides on the application for planning permission and either approves it, approves it subject to conditions, or rejects it altogether.

It is pertinent that the LA consults other government agencies and statutory bodies while approving the planning application. This ensures that the development plan complies with statutory requirements and relevant government regulatory agencies, such as the fire department and the building inspectors. In *Bencon Development Sdn Bhd v Majlis Perbandaran Pulau Pinang*,[40] The court held that the MPPP should have obtained technical advice from other relevant government departments before approving the planning application. Nonetheless, Act 172 does not provide a specific mode for consultation or the authority to consult. By implication, LA is given the discretion to decide the consultation mode and consider input.[41]

[40][1999] MLJU 91.

[41]Maidin and Ali, "Powers of Local Authority," 140

Another important aspect of planning permission is consultation with the adjoining neighbour of the proposed development to make objections. Section 21 Act 172 enables such objection only if 'the proposed development is located in an area in respect of which no local plan exists for the time being.' The planning authority must serve notice in writing to the owners of the neighbouring lands, informing them of their right to object to the application and to state their grounds of objection within 21 days of the date of service of the notice. Such owners may also demand a hearing of their objections.

Harding correctly observed that much of Peninsular Malaysia is covered by a local plan; the section has no effect in such areas, severely limiting even this already narrow right of public participation.[42] In the Federal Territory of Kuala Lumpur, no notice of a planning application to adjoining owners is required. Ainul and Bashiran proposed that it would help ensure proper planning practice if adjoining neighbours could participate in the decision-making process irrespective of whether there is a local plan.[43]

In the case of *Datin Azizah bte Abdul Ghani*[44], the court decided that the duty to inform adjoining owners remained despite the statutory silence. According to section 22 of the Federal Territory Planning Act 1982, the mayor must consider 'material considerations' in making his decision on a planning application as the provision states the planning authority must consider any objections as part of its duty to 'take into consideration such matters as are in its opinion expedient or necessary for proper planning.' In *Perbadangan Pengurusan Trellises v Datuk Bandar Kuala Lumpur,*[45] Public participation has become more significant in the Kiara Green case. The Court of Appeal decided that the mayor's decision was invalid because of a conflict of interest and the absence of evidence that the residents' concerns had been considered. Also, the mayor breached an implied duty to explain his decision.

[42]Harding, "A Baseline Study," 36.
[43]Maidin and Ali, "Powers of Local Authority," 143.
[44][1992] 2 MLJ 393.
[45][2023] 3 MLJ 829.

Harding rightly observed that the Court of Appeal decision was significant as it entrenches the principle of public participation in planning decisions.[46] Also, the definition of a 'neighbour' is minimal under section 21, and the Court of Appeal's expansion of the term is much welcomed. According to section 21, 'neighbour' includes:

(a) registered owners of lands adjoining the land to which the application relates.

(b) the registered owners of land which would be adjoining but for being separated by any road, lane, drain, or reserve land not more expansive than twenty meters; and

(c) registered landowners inside a cul-de-sac, within 200 meters from a proposed development within the same cul-de-sac and sharing the same access road.

With the Court of Appeal decision, more 'neighbours' can participate in planning proceedings, making it easier for people to raise their objections. As Harding rightly puts it, the expansion of 'neighbour' participation tends to benefit urbanites but not those in rural areas because the extent of public participation is ultimately dependent on civil society, which is an urban phenomenon.[47]

The Federal Court, on appeal, decided to uphold the Court of Appeal decision. *In Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors. In other appeals*,[48] the question of locus standi under O53 r2 ROC, the threshold question is whether the person is 'adversely affected' by the DO.

Whether a person is 'adversely affected' remains a question or issue for the court to determine regarding the grievance's factual and legal matrix. The legal matrix refers to relevant legislation that is subsisting and applicable at the material time (para 373).

The Federal Court further elaborates that the applicant must show that he has been 'adversely affected' rather than showing a 'genuine interest to meet the threshold requirement for standing to sue (para 439). The Federal Court concurs with the Court of Appeal that

[46]Harding, "A Baseline Study," 37.
[47]Harding, "A Baseline Study," 37.
[48][2023] 5 CLJ 167 (FC).

the respondents do not have to fall within the categories of landowners set out in rule 5(3) of the planning rules (para 371).

Section 23 Act 172 provides for an appeal against the planning authority's decision. It states that an appeal may be made to the Appeal Board within one month of the decision's communication date. In this regard, it is appropriate for the applicant to appeal to the Appeal Board rather than apply for judicial review. However, there seems to be some leeway as the court allows judicial review applications even though the applicant has not appealed to the Board against the decision. The Federal Court in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan*[49] decided that if an applicant in judicial review proceedings can demonstrate an element of illegality in the decision-making process, he does not need to exhaust his statutory right of appeal before embarking upon the judicial review exercise.

Also, in the *Asia Pacific Education Holdings Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri,*[50] the High Court decided that a domestic remedy is not a bar to judicial review where there is a clear case of illegality, irrationality, unreasonableness, and lack of jurisdiction in the decision-making process.

REGULATING LA'S DISCRETIONARY POWER

An important principle of judicial review is the challenge against statutory decision-making based on abuse of discretion. It is the reasonableness test pronounced by the House of Lords in the case of *Associated Provincial Picture House Limited v Wednesbury Corporation,*[51] Lord Greene MR, in his famous judgment, said that any conditions imposed in planning permission by the LA must be reasonable based on an objective test that a reasonable man considers the discretionary power exercised reasonable. In the context of section 21 (3)(g) of Act 172, the condition imposed by "the local planning authority considers necessary for purposes of planning" must fulfill the reasonableness test.

[49][1999] 3 CLJ 65.
[50][2022] 1 LNS 1442.
[51][1948] 1 KB 223.

The 'reasonableness test' has been expanded into the 'proportionality' test, which is much broader in scope and application. *In Council of Civil Service Unions v Minister for Civil Service,*[52] the House of Lords (per Lord Diplock) explained that the proportionality principle is summarised as 'not only that power must be used for a legitimate purpose, but it must also be proportionate in scope and effect.' Wan Azlan and Nik Kamal rephrased it, 'There must be a degree of balance between the objective in the exercise of power, the manner to achieve it, and the ends to be aimed for.'[53] In *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing,*[54] Lord Clyde said:

> Whether: (i) the legislature objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

Vernon Ong J succinctly restated the principle in *Laguna De Bay Sdn Bhd v Majlis Perbandaran Subang Jaya,*[55] where he elaborates that judicial review is classified into the following grounds, namely:

(a) Illegality- where the decision-maker must correctly understand the law that regulates his decision-making power and must give effect to it. Whether he has par excellence is a justiciable question to be decided, in the event of a dispute, by those people, the judges, by whom the state's judicial power is exercisable.

(b) Irrationality- what can be succinctly referred to as 'Wednesbury unreasonableness' by now. It applies to a decision so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it.

(c) Procedural impropriety – whether there is any violation of procedure described in the Constitution, legislation, or regulations.

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[52][1985] AC 374.

[53]Wan Azlan Ahmad and Nik Ahmad Kamal Nik Mahmod, *Administrative Law in Malaysia* (Thomson, Sweet & Maxwell, 2006), 89.

[54][1999] 1 AC 69.

[55][2014] 7 MLJ 545.

In *Dr. Benjamin George & Ors. v Majlis Perbandaran Ampang Jaya & Ors*,[56] it was held that the conditions imposed by the planning authority on an application for planning permission under section 21 (3) of Act 172 were reasonable. The conditions must also relate to the development proposal report and the layout plans.[57] In *Chong & Co. Sdn. Bhd. In Majlis Perbandaran Pulau Pinang*, the court affirmed the local planning authority's right to impose conditions as it "thinks fit."[58]

The absence of an appeal against the decision made under section 21(3) Act 172 means that the only recourse is by way of judicial review. Appeal is available for decisions made under section 22(3), which provides for the decision-making process by the planning authority. The appeal to the decision is provided for under section 23(2). While the decision made by the LA is appealable, it is a trite law that the planning application should be disposed of as soon as possible to avoid delay. A decision made by the planning authority means not only a decision to allow planning application but also a decision to disapprove it. Once a decision is made, the appeal procedure is triggered. The Planning Appeal Board is only to hear the appeal on a decision but not to hear the appeal under section 21(3).

In *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn. Bhd,*[59] The court decided whether the condition imposed by the planning authority on the landowner was valid. Adopting the reasonableness principle on the exercise of discretionary power, the court laid down the following principles to determine the validity of planning (the approving authority does not have an uncontrolled discretion to impose whatever conditions it likes.

- the valid conditions must fairly and reasonably relate to the permitted development.
- the approving authority must act reasonably, and planning conditions must be reasonable, and

[56][1995] 3 MLJ 665.
[57]Maidin and Ali, "Powers of Local Authority," 143.
[58]See also *Perbadanan Pengurusan Trellises case* [2023] 5 CLJ 167.
[59][1979] 1 MLJ 135.

- the approving authority is not at liberty to use its power for an ulterior object, however desirable that object may seem to be in the public interest.

Thus, it is pertinent that the planning authority considers all the relevant aspects of the application and disregards irrelevant matters.

In *Majis Perbandaran Pulau Pinang v Syarikat Bekerjasama Serbaguna Sungai Gelugor dengan Tanggungan*,[60] the local planning authority imposed a planning condition about a development project to include building affordable housing accommodation. The Federal Court, in deciding whether the conditions imposed were permissible, applied the following tests:

(a) They must be imposed for a planning purpose, not an ulterior motive.

(b) They must fairly and reasonably relate to the development permitted; and

(c) They must not be perverse ("so unreasonable that no reasonable authority could have imposed them").

Applying those tests, the court found that the condition requiring the developer to build affordable houses was permissible and consistent with the structure plan as per section 8(4) of Act 172. Secondly, the condition imposed was not ultra vires as it was reasonably related to the development permitted.

In *Rethina Development Sdn. Bhd. v Majlis Perbandaran Seberang Perai, Butterworth*,[61] The main question was whether the planning authority was empowered under the law to impose monetary contributions to the local council for the planning permission to build flats and shophouses in a housing scheme and a requirement to do landscaping and plant trees. The developer agreed with the requirement to pay a monetary contribution to the Council. On the monetary contribution to the Council and the requirement to plant trees and landscaping work, the court decided in favor of the developer on the ground that these conditions do not come within the meaning of 'any other matter' in section 21 (3) of Act 172 which the local planning authority considers necessary for planning. The local planning

[60][1996] 3 CLJ 335.
[61][1990] 2 MLJ 111.

authority is not empowered in law to demand payment of monetary contribution for landscaping and tree planting instead of the requirement imposed on the developer. In these circumstances, the Council was ordered to refund all the monies collected from the developer.

These cases show that local authorities must exercise their discretion judiciously. Misuse of power, albeit in good faith, is open to challenge in court. Wide and insecure words such as that of section 21(3) invite critical evaluation by the court to determine its suitability and reasonableness. However, the courts often refrain from reviewing the planning authorities' decisions because such decisions involve policy consideration, and 'the courts do not possess knowledge of the policy considerations which underlie such decisions'.[62] The concern can be seen in the *Sri Lempah* case, where the court held that the court is not an appellate authority with more powers than the approving authority but merely a judicial authority authorized to examine whether the approving authority has acted outside the statutory powers. Further, no court should pretend that it knows more or better about town planning than town planners themselves.[63]

Procedural fairness includes the planning authority's duty to make a reasoned decision. *In Doody v Secretary of State for the Home Department,*[64] the House of Lords indicated that the duty is implied. In Malaysia, in *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan*,[65] the Court of Appeal decided that the right to a reasoned decision is part of the fundamental rights under articles 5 and 8 of the Constitution. The Federal Court decision of *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor* reiterated the planning authority's duty to give a reason for its decision. Edgar Joseph Jr FCJ said:

> We endorse the principle enunciated by the Privy Council in *Stefan*…and we say that in exceptional circumstances of this case and having regard to the trends towards increased openness in matters of government and administration as a matter of fairness, reasons should have been given by the Council as to why it was imposing the disputed condition and thus, resiling from the original

[62]Maidin and Ali, "Powers of Local Authority," 146.
[63]Maidin and Ali, "Powers of Local Authority," 146.
[64][1993] 3 All ER 92.
[65][1996] 3 AMR 3181.

> approval of planning permission which was free from any pricing condition.

SUBSTANTIVE FAIRNESS

It is argued that substantive fairness as a ground of judicial review entails the court exercising its residual power to review an administrative decision and strike it down on the ground that the decision is substantively unfair, submitted that it is an independent ground of judicial review, where the court may enter the merits of the administrative decision and test such decision for fairness and quash it for being an unfair decision.[66]

Sudha Pillay submitted that the doctrine of substantive fairness as a ground of judicial review may be traced back to the earlier decision handed down by the Court of Appeal in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor*.[67] Gopal Sri Ram JCA, handing down the court's decision, held that the punishment imposed by the SPP had to be fair and just. In this context, the learned judge said:

> Thus, the requirement of fairness, which is the essence of Art 8(1), when read together with Art 5(1), ensures *not only* that a fair procedure is adopted in each case based on its facts *but also that a fair and just punishment is imposed* according to the facts of a particular case.

In *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah dan Pihak Berkuasa Negeri* case, Gopal Sri Ram JCA observed that:[68]

> *Article 8(1) of the Federal Constitution* strikes at the heart of arbitrariness in public decision-making and imposes a duty upon a public decision-maker to act fairly …The result of the decision in *Rama Chandran* and the cases that have followed it is that *the duty to act fairly is recognized to comprise of two limbs: procedural fairness and substantive fairness*. Procedural fairness requires that when arriving at a decision, a public decision-maker must adopt a fair procedure. *The doctrine of substantive fairness requires a public*

[66]See Sudha CKG Pillay, 'The emerging doctrine of substantive fairness – A permissible challenge to exercising administrative discretion?' *Malayan Law Journal*, 3 no. 1 (2001), 1-21.
[67][1996] 2 AMR 1617, 1655.
[68][1998] 3 MLJ 289, 323.

> *decision-maker to arrive at a reasonable decision and to ensure that the punishment he imposes is not disproportionate to the wrongdoing complained of. It follows that if in arriving at a public law decision, the decision-maker metes out procedural fairness, the decision may nevertheless be struck down if it is found to be unfair in substance*. (emphasis added)

According to the Court of Appeal *in Sugumar Balakrishnan,* administrative decisions may be assessed as substantially fair or otherwise based on procedural and substantive fairness. On substantive fairness, the Court of Appeal said two questions must be answered: whether the decision is reasonable or proportionate. Sudha Pillay observed that the fact that the court outlined substantive fairness in terms of unreasonableness and proportionality lends weight to the inference that the court did not intend substantive fairness to constitute an independent ground of judicial review but only as a label to denote the existing grounds of unreasonableness and proportionality.[69]

The Federal Court disagreed with *Tan Tek Seng's* decision and *Sugumar Balakrishnan's* case. In *Sugumar's* case, the Federal Court took the view that the exclusion clause in section 59A of the Immigration precluded the exercise of judicial review as Parliament had intended it. As interpreted by the court, the broad meaning of the word 'life' in Article 5(1) is too broad and does not apply in all circumstances. It is a very cogent approach taken by the Court of Appeal in *Sugumar* to introduce the doctrine of substantive justice to ensure that the effects of Article 5(1) and Article 8(1) are felt in administrative justice.[70]Nonetheless, the substantive justice approach is a strong justification created by the Court of Appeal to justify the exercise of judicial review against administrative action.

NEEDS VS CAPABILITY

There is always a justification that LA cannot fulfill its public obligations due to financial constraints. Even if a court of law adjudges that the LA has failed in its statutory duty, its incapability to carry it out matters. On the other hand, LA is politically and morally obliged to provide the needed facilities for the people within its jurisdiction. Thus,

[69]Sudha CKG Pillay, "The Emerging Doctrine," 4.
[70][2002] 3 AMR 2817.

it is essential that LA persevere and, at its best, ensure that services and facilities are provided to the public. As much as a contractual duty they owe to their ratepayers, LA is responsible for protecting the people in their local jurisdiction from any harm due to poor upkeep of infrastructure within its purview and control.

CONCLUSION

Whether it is a statutory or moral obligation, LAs are there to carry out their functions and provide the public with the required and optional amenities. Despite facing several financial constraints, LAs work hard to fulfill their obligations. In that light, LAs must strive to obtain as many resources as possible to ensure that services are rendered in the best ways possible. Despite those efforts, shortcomings and weak management may have caused slacking in services and poor decision-making at various levels. The development of judicial review to challenge the LA's decision-making process seems encouraging, except that sometimes the courts have become unpredictable. Other means of check and balance, such as political and social pressure, may be relied upon. Unfortunately, the balancing act through such means is also unpredictable and uncertain.

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